Malpac Capital Sdn Bhd v Yong Toi Mee & Ors and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS A-02(IM)-417–03 OF 2015 AND A-02(IM)-418–03 OF 2015
ZAWAWI SALLEH, VERNON ONG AND ABDUL RAHMAN SEBLI JJCA
15 JULY 2016

Civil Procedure — Res judicata — Final judgment obtained — Findings of High Court judge affirmed by apex court — Whether there was revisiting of issues after order had been perfected — Whether issues conclusively decided could be re-litigated or raise again

The appellant nominated the third respondent to receive a plantation which the former had received to offset a secured debt. In turn, the appellant entered into three agreements, one of which was with the first and second respondents for the sale of two ordinary shares held by the appellant in the third respondent. The first and second respondents submitted that they were ready and willing to complete the purchase but the appellant refused to accept the balance of the purchase price. The first and second respondents initiated a claim at the High Court for specific performance of three agreements; and for the transfer of the entire issued and paid-up shares of the third respondent. The High Court allowed the first and second respondents' claim and dismissed the appellant's counterclaim. The decision was reversed by the Court of Appeal but the Federal Court upheld the High Court's decision. The appellant had not received the balance of purchase price by the first and second respondents. The first and second respondents sought for further directions ('encl 62') so that the judgment of the High Court could be carried into execution. The appellant filed a cross-application ('encl 69'). The judicial commissioner ('JC') allowed encl 62 but dismissed encl 69. Hence, the present appeal. The appellant, inter alia, submitted that the contractual rights of the parties did not merge in the decree for specific performance. The issue that arose for the court's determination was whether there was abuse of the process of the court by re-visiting and re-opening the issues which had been conclusively decided by the apex court.

Held, dismissing the appeal with costs of RM60,000:

(1) The decision of the Federal Court had finally disposed of the rights of the parties. Therefore, the controversy in respect of the rights and obligations between the parties had ceased to have an independent existence because they 'merged' in the final judgment pronounced by the Federal Court.

This merger is treated as equating to res judicata in the strict sense. The issue of the subsequent additional 99,998 shares and the non-payment of profits to the appellant as owner of the plantation before the actual completion of the agreement had already been adjudicated on the merits. They ceased to have independent existence and merged in the final judgment of the Federal Court. The appellant should not be allowed to re-open the matter or to have the court re-consider its conclusion (see paras 15–17).

(2) The doctrine of res judicata should be invoked. The grounds were a repetition of what were advanced in the review application before the Federal Court. The present litigation was unnecessary and was brought about by the appellant as it refused to accept the judgment of the Federal Court (see para 18).

[Bahasa Malaysia summary

Perayu mencalonkan responden ketiga untuk menerima ladang yang mana perayu telah menerimanya untuk *offset* hutang bercagar. Perayu pula memasuki tiga perjanjian, salah satu daripadanya adalah dengan responden pertama dan kedua bagi jualan dua saham biasa yang dipegang oleh perayu di dalam responden ketiga. Responden pertama dan kedua berhujah bahawa mereka bersedia dan sanggup untuk menyelesaikan pembelian tersebut tetapi perayu enggan menerima baki harga belian. Responden pertama dan kedua memulakan tuntutan di Mahkamah Tinggi untuk pelaksanaan spesifik tiga perjanjian; dan untuk pemindahan keseluruhan modal terbitan dan berbayar responden ketiga. Mahkamah Tinggi membenarkan tuntutan responden pertama dan kedua dan menolak tuntutan balas perayu. Keputusan diakas oleh Mahkamah Rayuan tetapi Mahkamah Persekutuan mengesahkan keputusan Mahkamah Tinggi. Perayu tidak menerima baki harga belian daripada responden pertama dan kedua. Responden pertama dan kedua memohon arahan-arahan selanjutnya ('lampiran 62') dengan itu penghakiman Mahkamah Tinggi boleh dilaksanakan. Perayu memfailkan permohonan balas ('lampiran 69'). Pesuruhjaya kehakiman ('PK') membenarkan lampiran 62 tetapi menolak lampiran 69. Maka, rayuan ini. Perayu, antara lain, berhujah bahawa hak kontraktual pihak-pihak tidak bergabung dalam dekri bagi pelaksanaan spesifik. Isu yang berbangkit bagi penentuan mahkamah adalah sama ada terdapat penyalahgunaan proses mahkamah dengan menyemak semula dan membuka semula isu-isu yang telah diputuskan secara konklusif oleh mahkamah tertinggi.

Diputuskan, menolak rayuan dengan kos sebanyak RM60,000:

(1) Keputusan Mahkamah Persekutuan telah akhirnya menyingkirkan hak pihak-pihak. Oleh itu, kontroversi berkaitan hak dan tanggungjawab di antara pihak-pihak telah tamat untuk mempunyai kewujudan kebebasan kerana ia 'merged' dalam penghakiman akhir yang disahkan oleh

Mahkamah Persekutuan. Penggabungan ini dalam erti kata sebenar dianggap sebagai sama kepada res judicata. Isu saham tambahan 99,998 berikutnya dan keuntungan yang tidak dibayar kepada perayu sebagai pemilik ladang sebelum penyelesaian sebenarnya perjanjian telah diputuskan atas merit. Mereka tamat mempunyai kewujudan kebebasan dan bergabung dalam penghakiman akhir Mahkamah Persekutuan. Perayu tidak patut dibenarkan untuk membuka semua perkara atau untuk membuatkan mahkamah untuk mempertimbangkan semula kesimpulannya (lihat perenggan 15–17).

(2) Doktrin *res judicata* patut dibangkitkan. Alasan-alasan adalah ulangan apa yang dikemukakan di dalam permohonan semakan di hadapan Mahkamah Persekutuan. Litigasi ini adalah tidak perlu dan ianya dibawa oleh perayu kerana enggan menerima penghakiman Mahkamah Persekutuan (lihat perenggan 18).]

Notes

For a case on final judgment obtained, see 2(4) *Mallal's Digest* (5th Ed, 2015) para 7928

Cases referred to

Abdul Shaker Sahib v Abdul Rahman Sahib and Anr AIR 1923 Mad 284, HC (refd)

Ramankutty Guptan v Avara AIR 1994 SC 1699, SC (refd)

Sungei Biak Tin Mines Ltd v Saw Choo Theng & Anor (No 2) [1970] 2 MLJ 226, FC (refd)

Tan Yeow Khoon & Anor v Tan Yeow Tat & Anor (No 2) [2000] 3 SLR 323, HC (refd)

Thoday v Thoday [1964] P 181, CA (refd)

Legislation referred to

Companies Act 1965 s 132C

Appeal from: Civil Suit No 22–109 of 2007 (High Court, Ipoh)

Cecil Abraham (Logan Sabapathy, Alithea Wong and Chuar Pei Yean with him) (Logan Sabapathy & Co) for the appellant.

Cyrus Das (A Iruthaya Raj and Abdul Razak with him) (Raj Selva & Co) for the respondents.

Zawawi Salleh JCA (delivering judgment of the court):

INTRODUCTION

[1] There are two interrelated appeals before us: Civil Appeal No A-02(IM)-417–03 of 2015 and Civil Appeal No A-02(IM)-418–03 of 2015. Both appeals arose out of the High Court's decision given on 17 February 2015 (Che Mohd Ruzima Ghazali JC (as he then was) presiding) which had allowed the first and second respondents' application in encl 62 and dismissed the appellant's application in encl 69.

[2] Enclosure 62 is the first and second respondents' application for directions pursuant to the judgment of the High Court given on 5 May 2011 (Zainal Adzam Abd Ghani J, presiding).

[3] Enclosure 69 is the appellant's cross-application where the appellant had applied for several issues of law to be considered and also sought various consequential orders, including a stay of the first and second respondents' primary application.

FACTUAL BACKGROUND AND THE ANTECEDENT PROCEEDINGS

[4] In order to give some perspective to these appeals, it is necessary to briefly outline the genesis of the dispute between the parties which has caused them to file their respective applications. These can be summarised as follows:

(a) the appellant (the first defendant in the High Court) is a wholly owned subsidiary of one Malpac Holdings Bhd, a listed company;

(b) in 2002, the appellant had been offered a plantation by special administrators of its debtor to offset a significant secured debt owned by that debtor to the appellant;

(c) the appellant had nominated its wholly subsidiary, namely the third respondent (the third defendant in the High Court) to receive that plantation;

(d) on 5 April 2002, the appellant together with one entity (the second defendant in the High Court) had entered into three agreements (the composite agreement) for the onward sale of plantation and the prospective sale of a mill. One of those agreements was an agreement between the appellant and the first and second respondents for the sale of two ordinary shares then held by the appellant in the third respondent;

(e) on or about January 2005, the original share capital of the third respondent consisting of two shares had been increased by an additional 99,998 ordinary shares;

(f) the first and second respondents averred that they were ready and willing to complete the purchase but the appellant refused to accept the balance of the purchase price;

(g) in reply, the appellant stated that the increase in capital was taken with express notice to the first and second respondents and they were aware that the appellant was not prepared to consider the sale of those subsequent additional 99,998 shares without a further agreement and appropriate corporate approvals;

(h) in 2007, the first and second respondents filed a claim vide Ipoh High Court CS No 22–109 of 2007, seeking the following primary reliefs:

(i) specific performance of the three agreements dated 5 April 2002 based of the values fixed in 2002; and

(ii) a further order for the transfer of the entire issued and paid-up shares of the third respondent;

(i) after full trial, the High Court allowed the first and second respondents' claim and also dismissed the counterclaim by the appellant and the third respondent;

(j) dissatisfied the judgment of the High Court, the appellant and the third respondent appealed to the Court of Appeal which allowed the appeal on 17 January 2012 and set aside the judgment of the High Court. The Court of Appeal further directed that the appellant's counterclaim be determined by the High Court;

(k) on 4 September 2013, the Federal Court reversed the decision of the Court of Appeal and reinstated the judgment of the High Court;

(l) on 4 March 2014, the Federal Court dismissed the appellant's application for review;

(m) on 19 June 2014, as stated earlier, the first and second respondents applied to the High Court for further orders and directions (encl 62). In response, the appellant filed a cross-application (encl 69);

(n) both applications were heard by the learned JC and on 17 February 2015, he allowed encl 62 and dismissed encl 69; and

(o) the appellant's appeal in respect of encl 69 is the subject of the Appeal No A-02(IM)-418–03 of 2015 and the appellant's appeal in respect of encl 62 is the subject of the Appeal No A-02(IM)-417–03 of 2015.

A FINDINGS OF THE HIGH COURT

[5] The core of the learned JC's reasoning is to be found in the following passages in his judgment:

B Enclosure 69

[40] All issues raised by the first defendant were taken up or supposed to be taken up before the Federal Court in the substantive appeal or on the review application. It needs to emphasise that the decision of the High Court had been affirmed by the Federal Court. It cannot be re-visited under any guise in any subsequent C proceedings. The decision of the apex court is final and the losing parties should not try to manoeuvre around it, however unhappy they are. Due respect should be given to the High Court's decision which was affirmed by the Federal Court. The so-called threshold questions and related issues raised by the first defendant on which the court has to address are neither new nor noble.

D Enclosure 62

[44] The first defendant exhausted all avenues to appeal. It refused to accept the payment tendered for the balance of the purchase price after the Federal Court dismissed the review application. The first defendant chose to act in defiance of the decree of specific performance by disobeying the courts' judgment. In that E situation, the plaintiffs have all the right to apply for further direction from the court to complete the purchase. The plaintiffs had been waiting for so long to reap the fruits of their fruitful litigation. The court can no longer deny or delay such right.

F THE APPEAL

[6] The focus of criticism which learned senior counsel for the appellant directs to the judgment of the High Court is four-fold. First, he complains that the learned JC erred in emphasising on unsuccessful appeal proceedings. G Secondly, he complains that the learned JC failed to properly address the core issues of whether or not the first and second respondents were entitled to call for a transfer of the subsequent additional 99,998 shares. Thirdly, he complains that the learned JC failed to consider the undisputed fact that there was no approval under s 132C of the Companies Act 1965 for the divestment of the H subsequent additional 99,998 shares. Fourthly, he complains that the learned JC erred in permitting the first and second respondents to obtain ownership of the plantation assets without first paying the outstanding profits.

[7] In sum, says learned senior counsel, the learned JC's decision was simply I wrong and his decision ought to be reversed.

[8] In reply, learned senior counsel for the first and second respondents submitted that after the dismissal of the appellant's application for review by the Federal Court on 7 March 2014, the first and second respondents had

tendered the balance of purchase price but it was not accepted by the appellant. In view of the position taken by the appellant, there was no choice but to seek further directions so that the judgment of the High Court given on 5 May 2011 can be carried into execution.

[9] The important plank of learned senior counsel's submission is that the learned JC had decided the appellant's claim and counterclaim by the first and second respondents on merits. The judgment had been perfected and the appellant appealed against the judgment and was unsuccessful and that should be the end of the matter. The appellant should not be allowed to abuse the process of the court by re-visiting and re-opening the issues which had been conclusively decided by the highest court in the land. The doctrine of res judicata should be invoked.

OUR FINDINGS

[10] We do not propose to discuss all of the issues raised by learned senior counsel for the appellant but we will deal with the important grounds of appeal advanced on behalf of the appellant.

[11] Learned senior counsel for the appellant submitted that the learned JC had disregarded in entirety the settled law on the nature and effect of a decree for specific performance.

[12] According to learned senior counsel, the learned JC had brushed aside the appellant's contentions on the nature and effect of a decree for specific performance simply because it had been unsuccessful in the earlier appeal proceedings. It was contended by learned senior counsel that a contractual rights of the parties do not merge in the decree for specific performance. It had been strongly argued before us that an order for specific performance does not get rid of the contract. The contract is not merged in the order, but it is treated, and always has been treated by the court of equity, as still subsisting. We have been referred to a great many cases of various courts in support of the submission but we shall contend ourselves with referring to the cases hereinafter discussed.

[13] In *Ramankutty Guptan v Avara* AIR 1994 SC 1699, the Supreme Court of India has in no uncertain term held that after passing the degree for specific performance, the court does not cease to have jurisdiction in the suit but retains control over the decree.

[14] In the same vein, in *Abdul Shaker Sahib v Abdul Rahman Sahib and Anr* AIR 1923 Mad 284, the Madras High Court held that the degree for specific performance was in its nature a preliminary decree; the original court

retains the full power to make any just or necessary order therein, including in appropriate cases, the extension of time.

[15] We have no difficulty in accepting the proposition above. However, on the factual matrix of the case before us, we agree with the JC's conclusion that the decision of the Federal Court had finally disposed of the rights of the parties. Therefore, the controversy in respect of the rights and obligations between the parties had ceased to have an independent existence because they 'merged' in that final judgment pronounced by the Federal Court. Further, this merger has long been treated as equating to 'res judicata' in the strict sense.

[16] We disagree with the submission of learned senior counsel for the appellant that after the conclusion of the appeal proceedings, there are two broad subsequent issues to be resolved by the court, namely:

(a) the issue of the subsequent additional 99,998 shares; and

(b) the non-payment of profits to the appellant as owner of the plantation assets before actual completion of the agreement.

[17] We are of the view that the above issues had already been adjudicated on the merits. Therefore, they ceased to have independent existence and merged in the final judgment of the Federal Court. The appellant should not be allowed to re-open the matter or to have the court re-consider its conclusion. This is because of the public interest in the finality of litigation. Without finality, the process and cost of litigation would be never-ending, as parties would forever be returning to the court to re-argue the case and for tactical advantage.

[18] We agree with the written submissions of learned counsel for the first and second respondents that the present round of litigation is unnecessary and is brought about by the appellant refusing to accept the judgment of the Federal Court. This is a repetition of the same ground that the appellant advanced in the review application before the Federal Court. The doctrine of res judicata should be invoked.

[19] Now, res judicata is a fundamental legal doctrine that prevents a party from re-litigating any claim or defence already litigated. It is meant to ensure the finality of judgments and to conserve judicial resources whilst protecting litigants from multiple litigation involving the same claims or issues.

[20] In the fourth edition of *Spencer Bower and Handley On Res Judicata* (2009), it is stated at para 1.05 that res judicata can either give rise to a cause of action estoppel or to an issue estoppel. The relationship between cause of action estoppel and issue estoppel was described by Diplock LJ in *Thoday v Thoday* [1964] P 181 at pp 197–198:

> The particular type of estoppel relied upon by the husband is estoppel per rem judicatam. This is a generic term which in modern law includes two species. The first species, which I will call 'cause of action estoppel', is that which prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties. If the cause of action was determined to exist, ie, judgment was given upon it, it is said to be merged in the judgment, or, for those who prefer Latin, transit in rem judicatam. If it was determined not to exist, the unsuccessful plaintiff can no longer assert that it does; he is estopped per rem judicatam. This is simply an application of the rule of public policy expressed in the Latin maxim 'Nemo debet bis vexari pro una et eadem causa'. In this application of the maxim 'causa' bears its literal Latin meaning.

[21] Learned senior counsel for the appellant submitted that the extracted judgment of the High Court given on 5 May 2011 only decreed specific performance of the three agreements dated 5 April 2002 without further orders to address the subsequent additional 99,998 shares. With respect, we disagree. In allowing the first and second respondents' claim and dismissing the counterclaim by the appellant, the first and second defendants were given liberty to apply to the court for further order and/or directions.

[22] The principles as to the scope of 'liberty to apply' provisions were stated by Lord Mackay of Clashfern in *Halsbury Laws of England* (4th Ed, Reissue), Vol 37, 2001, para 1230 as follows:

> The circumstances or the nature of a judgment or order often render necessary subsequent applications to the court for assistance in working out the rights declared. All orders of the court carry with them inherent liberty to apply to the court, and there is no need to reserve expressly such liberty in the case of orders which are not final. Where in the case of a final judgment the necessity for subsequent application is foreseen, it is usual to insert in the judgment words expressly reserving liberty to any party to apply to the court as he may be advised. The judgment is not thereby rendered any the less final; the only effect of the declaration is to permit persons having an interest under the judgment to apply to the court touching their interest in a summary way without again setting the case down. It does not enable the court to deal with matters which do not arise in the course of working out the judgment, or to vary the terms of the order except possibly on proof of change of circumstances. Should the declaration be omitted, application may be made to have the judgment rectified by inserting it. It will not, however, be made or implied in favour of a defendant as against whom the claim has been dismissed for any other purpose than for enforcing the terms of the order, nor in favour of a claimant whose cause of action disappeared before trial but who fears that the circumstances giving rise to the cause of action may recur.

[23] Even in the case of final orders or judgments that had been perfected, the case of *Sungei Biak Tin Mines Ltd v Saw Choo Theng & Anor (No 2)* [1970]

2 MLJ 226 held that liberty to apply was to be implied. In *Tan Yeow Khoon & Anor v Tan Yeow Tat & Anor (No 2)* [2000] 3 SLR 323, the court held that even if a subsequent order or direction were to be regarded as a variation, it would still fall within the ambit of the 'liberty to apply' provision if the order or direction were intended only to succour the original order.

[24] In our view, what amounts to a variation is a question of fact and circumstances obtaining in each case. In the case before us, we are of the view that the consideration of RM53m is for the entire equity of the third respondent and not for the two shares only. Our conclusion is supported by the following facts:

(a) the third respondent's averment in the statement of claim;

(b) that the consideration was for the purchase of the entire issued and paid-up capital of the third respondent. There was an implied admission by the appellant and the third respondent in their defence;

(c) the relief prayed for by the appellant is for the transfer of the entire issued and paid-up capital of the third respondent;

(d) it was an agreed fact that the purchase was in respect of the entire equity of the third respondent;

(e) the judgment of the High Court dated 5 May 2011 was also in respect of the entire equity; and

(f) the appellant appealed against the decision of the High Court to the Court of Appeal but there was no challenge that the learned High Court judge was wrong in ordering the transfer of the entire equity of the third respondent.

[25] Therefore, the issue relating to the rights of the first and second respondents to the additional 99,998 shares had already been resolved by the court and not an attempt by the first and second respondents to re-visit the same under the guise of 'liberty to apply' provisions.

[26] Concerning s 132C of the Companies Act 1965, we are of the view that the provision is not applicable to the case before us. We accept the submission of learned senior counsel for the first and second respondents that the appellant has given the required approval (see para 14(c) of the statement of agreed facts at p 76 of (B). The holding company too has given its approval (see p 197 of (B)).

[27] We also observe that the issue was part of the pleading (see pp 249–250 of (B), paras 24 and 25) and therefore the issue had already been adjudicated. The same issue was also taken up in the review application before the Federal Court but it was dismissed.

CONCLUSION

[28] The result, therefore, in that we affirm the decision of the learned JC and dismiss the appeal with costs of RM60,000. Deposit to be refunded.

Appeal dismissed with costs of RM60,000.

Reported by Afiq Mohamad